71-1659

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971
No. _____

EDWARD E. MILDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Judgment Affirming Judgment of the United States District Court for the District of Nebraska.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, filed in this proceeding on May 9, 1972. An Application for Extension of Time to file this Petition was granted by Mr. Justice Blackmun, on June 9, 1972.

The indictment in this case charged Edward E. Milder with income tax evasion for the calendar years 1963, 1964, and 1965, in violation of Title 26, United States Code, Section 7201. The case was tried to a jury and the verdict of guilty was returned on May 24, 1971. Petitioner was committed to the custody of the Attorney General of the United States for a period of three (3) years on each count, said periods of imprisonment to run concurrently and not consecutively.

Opinion Below.

The District Court's judgment was not reported. A copy of the opinion of the United States Court of Appeals for the Eighth Circuit, affirming the lower Court, is attached hereto as Appendix A. The opinion of the Court of Appeals is unreported at this time.

Jurisdiction.

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on May 9, 1972. On June 9, 1972, Mr. Justice Blackmun signed an Order extending the time for filing this Petition for Writ of Certiorari to and including June 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The United States District Court for the District of Nebraska had jurisdiction of this cause by virtue of Title 18, United States Code, Section 3231. A timely appeal was prosecuted in the Circuit Court of Appeals for the Eighth Circuit, which had jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

Questions Presented for Review.

1. May a defendant be convicted of income tax evasion when he files an income tax return, correct in every respect other than the omission of "embezzlement income"; does the holding of *James v. United States* still pertain to criminal responsibility in light of *Marchetti v. United States, Grosso v. United States,* etc.?

2. Was the lower Court in error in not granting defendants' motion for dismissal as a matter of law since there was no willful attempt to evade and defeat petitioner's tax liability?

3. Was the lower Court in error as a matter of law in not granting the defendants' motion for dismissal

in light of the uncontradicted evidence that none of the funds in question were used by the petitioner for any purpose whatsoever, and the strong evidence that the petitioner never intended to use the funds; were the omitted receipts income?

Statutory Provision.

26 U.S.C. 7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case.

The record below, as digested by the Court of Appeals, establishes that a jury found the petitioner guilty under a three-count indictment of having attempted to evade payment of federal income taxes by filing false returns for the years 1963, 1964, and 1965, in violation of the Internal Revenue Code of 1954, 26 U.S.C. 7201. The trial Court had jurisdiction under 18 U.S.C. 3231.

Petitioner is an accountant, and one of his clients during the years of his tax offenses, was the Milder Oil Company, which was operated by his half-uncle and half-cousins. Petitioner's relationship with the company was such that he had authority to and did cause checks to be drawn upon company bank accounts and signed by authorized officers for amounts determined by Petitioner to be due to various persons

and entities. He devised a plan of overstating the amounts which the Milder Oil Company was required to pay for excise taxes, causing company checks to be drawn for these inflated amounts, and then applying the excess funds to the tax obligations of his other clients. When the clients subsequently provided Petitioner with checks to pay their taxes, these checks were cashed and the proceeds placed in a box in Petitioner's office. Petitioner kept the funds intact throughout the period during which he possessed them. The oil company eventually became suspicious, discovered the diversion, demanded and received restitution. The Internal Revenue Agent testified that after an extensive investigation, he could find no instance in which Milder had used any of the appropriated funds.

Petitioner testified, without contradiction, that the money had not been taken for personal use, but rather because of a hatred for his more prosperous cousins. Thus, he did not consider the embezzled sum to be personal income for purposes of taxation; he always knew that he would some day pay it back. Petitioner further testified that he was aware of various Supreme Court decisions which had ruled embezzlement income non-taxable, and was not aware of any subsequent change in the law. Mr. Milder never reported the appropriated sums as income, nor did he deduct the repayment as an expense. The evidence is clear that through use of operating loss carrybacks, the net effect of reporting the appropriated monies as income during the years in question and then deducting the repayment in the year of repayment would result in a net *overstatement* of income tax in the amount of $26,000.00 for the three years in question.

The uncontradicted testimony of Petitioner was supported by an eminent psychiatrist, Dr. Chester Farrell, who testified that, in his professional opinion, Mr. Milder was telling the truth in stating that the misappropriations were directed as retaliation against his family and not for Milder's personal gain, and that Milder in fact did not believe these sums to be income. Mr. Milder was described as an "obsessive compulsive neurotic", and Dr. Farrell stated that he developed a monomania, a form of paranoia.

Motions to Dismiss were made after the Government had presented its case, after the defense rested, and at the conclusion of the case; all were denied.

This case commends itself to this Honorable Court because it involves a series of serious legal questions that will resurrect themselves on many other occasions.

Further, it would appear that the Eighth Circuit and Ninth Circuit would probably decide this type of case differently. We refer specifically to the collision course of *Marchetti, Grosso* and *James* on the Fifth Amendment construction; to the doctrine of "temporary" deprivation (a non-income concept) enunciated in *Edwards* by the Ninth Circuit as contrasted with the attitude of the present panel of the Eighth Circuit; and, the continual difficulty of defining "willfulness".

ARGUMENT.

I.

The Reliance of the Courts Below on the Case of James v. United States Is Misdirected.

The trial Court and Court of Appeals concluded that the appropriations in question constituted embezzlement income. In *James v. United States*, 366 U.S. 213, 219 (1961), the Court held:

> "A gain 'constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.' . . .
>
> "When a taxpayer acquires earnings, lawfully or unlawfully, without consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' "

The Court then overruled the prior holding of *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946), and generally held that embezzlement income is subject to income tax.

Petitioner below attacked the current validity of the *James* case in instances in which a proper Fifth Amendment privilege is claimed, relying on *Grosso v. United States*, 390 U.S. 62 (1968), *Marchetti v. United States*, 390 U.S. 39 (1968), *Haynes v. United States*, 390 U.S. 85 (1968), and *Leary v. United States*, 395 U.S. 6 (1969). *Grosso* and *Marchetti* treated taxes as

valid for civil purposes only, and that ruling should be extended to the facts of this case.

The defense herein was premised on the uncontested fact that embezzlement is a crime in the State of Nebraska. Petitioner urged that to require disclosure of any information which would tend to incriminate him on his federal income tax return is a violation of his privilege under the Fifth Amendment. In *Grosso, Marchetti, Haynes,* and *Leary,* the Court held that defendants could not be criminally prosecuted for failure to pay the wagering occupational tax and wagering excise tax, registering under the National Firearms Act, and complying with the Marijuana Tax Act.

This case is easily distinguished from *United States v. Sullivan,* 274 U.S. 259 (1927) relied upon by the Court of Appeals. Defendant Sullivan had income derived from illegal trafficking in liquor. Due to the illegal nature of the income, he failed to file an income tax return and was charged with that crime. The Court held that if the form of the tax return provided called for answers that the defendant was privileged from making, he could have raised the objection on the return, but could not on that account refuse to make any return at all. Most of the returns' questions would not have compelled incriminating disclosures. (In this case those disclosures were made, and tax was paid). The Court noted that it was not deciding what information could be withheld. 274 U.S., at 263-264.

The Court of Appeals also placed substantial reliance on *United States v. Knox,* 396 U.S. 77 (1969), which dealt with the falsification of answers on a wagering registration form. Knox had understated the number of his employees on that form; it was clear that the number of that defendant's employees could

not furnish incriminating evidence, once he decided to file the form disclosing that he was in the business of accepting wagers. In the case at bar, it is clear that Petitioner reported *all* of his taxable income, except for the amount appropriated from Milder Oil Company.

A potential defendant need not provide the incriminating evidence in order to demonstrate that his privilege is validly invoked. If the information can possibly have a tendency to incriminate him, it need not be disclosed. *Hoffman v. United States,* 341 U.S. 479, 486-488.

The principal interest of the United States is the collection of revenue, and not the punishment of wrongdoers. *Marchetti v. United States, supra,* 390 U.S. at 57.

Petitioner recognizes that the natural consequences of his position as set forth herein, is the rule of law that even though income received through unlawful means is subject to taxation, an individual may not be criminally prosecuted for failure to report such income if he validly asserts his privilege against self-incrimination under the Fifth Amendment. We submit that this situation arises through inaction by the Internal Revenue Service. We suggest that Congress or the Internal Revenue Service, through its own devices, could have promulgated statutes or regulations which would have aborted the problem presented in this case.

How would the Internal Revenue Service have the Petitioner reflect the "income" in question and still preserve his Fifth Amendment rights? Assuming *arguendo* the sums in question to be income, the Petitioner may not attempt to evade and defeat the tax by the filing of a false return (26 U.S.C. 7201), and therefore must report the income. He also faces criminal sanc-

tions if he makes a false statement on an income tax return as to any material matter. 26 U.S.C. 7206(1), *cf.*, 18 U.S.C. 1001. Petitioner therefore need not only disclose the income in question, but must disclose it in a completely truthful manner. He cannot label the income in question in some innocuous manner, since that designation may arguably be false and therefore result in the commission of a crime. The choices of failing to report an item of income, report it in such a manner so as to not truly reflect its nature, or the full disclosure of the nature and amount of the income, in violation against the individual's privilege against self-incrimination, requires an impermissible election between the commission of a crime or waiver of the privilege of self-incrimination.

We submit that Congress or the Internal Revenue Service could promulgate statutes or regulations whereby taxpayers may place items of income on an income tax return without designating its nature or source, or provide some other means whereby taxpayers may pay tax on income received through illegal means. We submit that there is no such provision at this time, either in the Internal Revenue Code itself or in the regulations promulgated by the Commissioner of Internal Revenue. We respectfully submit that while embezzled monies under normal circumstances constitute income for civil tax purposes, an individual may assert his privilege against self-incrimination by failing and refusing to disclose the nature of such income on his return, since he has no other remedy under law. This defect was relied upon in *Marchetti, supra,* 390 U.S. at 65, where the Court stresses that there is no provision for payment of the tax without furnishing the incriminating material.

II.

Petitioner's Motion to Dismiss Should Have Been Granted Because Petitioner's Actions Demonstrated No Willful Intent as a Matter of Law.

A. "Willfulness", Generally.

The classic definition of the word "willfully" is found in *United States v. Murdock,* 290 U.S. 389, 394-396 (1933):

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose (citations); without justifiable excuse (citations); . . .
>
> "This Court has held that, where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime . . . Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

The definition was further defined in *Spies v. United States,* 317 U.S. 492 (1943), where the Court noted that the Congress has imposed a wide variety of sanctions for the protection of the revenues, both civil and criminal. Section 7201 is the "climax of this variety of sanctions." The difference, for example, between the misdemeanor of willful failure to pay a tax and the felony of willfully attempting to defeat and evade one,

is found in the affirmative action implied from the term "attempt" as used in the felony section. Congress intended some willful *commission* in addition to the willful *omissions* that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute a misdemeanor, but it must be combined with a willful and positive attempt to lift the offense to the felony at issue herein. 317 U.S., at 497-499.

In a prosecution for tax evasion:

> "A final element necessary for conviction is willfulness. Petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule." *Holland v. United States*, 348 U.S. 121, 139 (1954).

We submit that the evidence herein clearly establishes that the Petitioner's intent was directed at depriving his relatives of large sums of money, rather than converting that money to his own use and failing to report it on his income tax returns. Under the law prior to *James, supra,* as enunciated in *Commissioner v. Wilcox, supra,* the appropriations in question were clearly not income. The trial Court had the duty to grant defendant's motion to dismiss since there was reasonable doubt with regard to the willfulness of petitioner's acts, as a matter of law.

In addition, we respectfully suggest that the Government primarily, and the trial Court to some extent, prejudicially concentrated on the element of "embezzlement", rather than directing the thrust of the case to the income tax implications of the transactions, and Petitioner's state of mind with regard to income taxes

and his neurotic actions directed at his wealthy relatives. Under these circumstances, the Court was obligated to direct its attention to the legal definitions of "willfulness" and "income" to a greater extent than might normally be appropriate.

The evidence is clear that all income other than the appropriations was reported; that the net tax effect of the appropriations and their repayment resulted in an overpayment of Petitioner's taxes; that Petitioner's actions were directed against his relatives rather than against the Internal Revenue Service; that Petitioner did not believe that he had income; and, that the Petitioner's actions were the result of a medical problem.

We believe that the holding in this case is contrary to the statement of law of the Court of Appeals for the Ninth Circuit, in *Edwards v. United States*, 375 F.2d 862, 867 (1967):

> "The trouble in this case is in its lack of proof of willfulness in the sense of a specific intent to evade or defeat the tax or its payment. Evasion and defeat, as we understand their use in this section, contemplate an escape from tax and not merely a postponement of disclosure or payment. A knowing and intentional omission to file could be the result of either purpose, and either purpose might support a prosecution for the state crime of embezzlement or other form of theft. Tax evasion, however, focuses on the accused's intent to deprive the Government of its tax monies, and this requires more than just delay."

In this case, Petitioner clearly intended to deprive his relatives of their money; not to deprive the Government of its tax monies. As the Court notes in *Edwards*,

one pursuing a path such as that of appellant, might eventually fall so far behind that no reasonable man would believe that he would ever catch up. Such was not the case, however, in *Edwards,* and was not the case herein since Petitioner had not spent any of the appropriated funds, intended to return them, and was at all times fully capable of doing so.

B. Refusal to Instruct on the James Case.

Defendant requested the following instruction, designated as Defendant's Requested Instruction 17:

> "You are instructed that in 1947 the United States Supreme Court held that embezzled funds did not constitute taxable income to the wrongdoer but were and remained the property of the rightful owner thereof and that the embezzler therefore did not incur tax liability on his acquisition of such funds. Such interpretation of the law was in effect for fourteen years. In 1961 the United States Supreme Court, with four justices dissenting, re-interpreted the law and held that embezzled funds were taxable to the recipient notwithstanding his legal obligation to return them to the rightful owner thereof. The applicable law itself, as enacted by Congress, was not changed during that period but it was merely the Supreme Court's opinion of what the law provides that was changed."

The above statement is a correct interpretation of the law. Counsel for Petitioner attempted to introduce during trial evidence of the manner in which the *James* case constituted a change in the law. The change in the law was close in time to the tax years in question. Counsel for Petitioner urged that the prosecution had

elicited testimony from former associates of Mr. Milder that he subscribed to income tax services, for the obvious purpose of establishing that Milder had knowledge of the law. The Court excluded the testimony and stated that the jury would be instructed as to the law. Defendant's Requested Instruction 17 was then refused.

In order for the jury to properly judge the willfulness of Petitioner, we respectfully submit that they should have been instructed that the Defendant's actions were not in violation of the law as it existed through part of 1961, and that the change in law was promulgated by the Supreme Court. This factor could have weighed heavily in the jury's determination of whether Milder in fact knew that his appropriations constituted taxable income.

III.

Petitioner's Motion to Dismiss Should Have Been Granted as a Matter of Law Because the Evidence Could Not Establish That the Appropriations Constituted Income.

The argument on this point parallels the argument above with regard to willfulness, and will not be reiterated herein. We simply note that under the definition of income as set forth in the *James* case, quoted above, and the theory of permanent deprivation as set forth in the *Edwards* case of the Ninth Circuit, the extent of dominion and control exercised by Petitioner over the funds in question does not create taxable income; more correctly, the jury could not have found beyond a reasonable doubt that the Petitioner recognized taxable income.

IV.

Conclusion.

When income tax violations are used to punish activity that is or may be otherwise illegal, this thrust is usually defended on the basis that the object of governmental scrutiny deserves punishment by being involved in organized crime.

Allegedly, that type of defendant taxpayer has insulated himself from punishment for these other crimes by use of layers and tiers of intermediate employees and agents. Penetration is difficult and the circular approach available through the Internal Revenue Code (Title 26) permits the focus to be placed where it belongs without the need for removing the protective covering.

All well and good. However, when the statute of limitations has not otherwise run and when State authorities can be mobilized, if appropriate, to pursue the State violation—embezzlement here—it becomes an inappropriate extension of the criminal tax laws to pursue alleged unreported income thusly.

At the minimum, the relationship between Petitioner Milder and his relatives is permeated with neurotic hostilities. Even the word "hate" was used in an unrestrained manner.

To expect a jury to be able to distinguish between the psychiatric overtones and the tax laws is unrealistic. As a matter of law, the trial Court should have granted the petitioner's motion to dismiss predicated on a multiplicity of factors, to wit:

(1) The interplay between the *Marchetti, Grosso,* and *James* cases.

(2) The absence of income in this type of case under the *Edwards* case of the Ninth Circuit.

(3) The absence of willfulness, *i.e.*, specific *mens rea* for a 26 U.S.C., Section 7201 violation (income tax evasion) under *Murdock, Spies,* and *Holland.*

Although the jury instructions were adequate, a jury is still not able to decide questions of law. The bench and the bar are deeply troubled by these enormously complex legal questions and the struggle for comprehension cannot be assisted by mobilizing laymen.

Respectfully submitted,

BRUCE I. HOCHMAN,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Eighth Circuit.

United States Court of Appeals, for the Eighth Circuit.

United States of America, Appellee, v. Edward E. Milder, Appellant. No. 71-1443.

Appeal from the United States District Court for the District of Nebraska.

Submitted: February 16, 1972.

Filed: May 9, 1972.

Before Matthes, Chief Judge, Breitenstein,* Senior Circuit Judge, and Ross, Circuit Judge.

Matthes, Chief Judge.

A jury found appellant guilty, under a three-count indictment, of having attempted to evade payment of federal income taxes by filing false returns for the years 1963, 1964, and 1965,[1] in violation of the Internal Revenue Code of 1954, 26 U.S.C. §7201.[2] Judgment was entered upon the verdict and this appeal has re-

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*Senior Circuit Judge, Tenth Judicial Circuit, sitting by special designation.

[1]The first count of the indictment charged that Milder reported his taxable income for 1963 as having been $19,188.10, whereas his actual taxable income was $68,274.79; the second count charged false reporting of a $34,626.10 taxable income for 1964, the true figure having been $61,923.94; the third count charged Milder with having reported a taxable income for 1965 of $38,203.34, the proper figure having been $60,885.63.

[2]26 U.S.C. §7201.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

sulted. Because appellant does not question the sufficiency of the evidence to sustain a guilty verdict, our resume of the pertinent facts will be brief.

Milder is an accountant and one of his clients, during the years of his tax offenses, was the Milder Oil Company, which was operated by his uncle and cousins. Appellant's relationship with the company was such that he had authority to and did cause checks to be drawn upon company accounts and signed by authorized officers for amounts determined by appellant to be due various persons and entities. Appellant devised a scheme of overstating the amounts which the oil company was required to pay for excise taxes, causing company checks to be drawn for these inflated amounts, and then applying the excess funds to the tax obligations of appellant's other clients. When the clients subsequently provided appellant with checks to pay their taxes, these checks were cashed and the proceeds placed in a box in appellant's office. The oil company eventually became suspicious, discovered the embezzlement, and demanded and received restitution.

Appellant apparently had kept the funds intact throughout the period during which he possessed them. He testified that the money had not been taken for personal use but rather because of a hatred for his more prosperous cousins, and thus that he did not consider the embezzled sum to be personal income for purposes of taxation. Appellant testified further that he was aware of various Supreme Court decisions which had ruled embezzlement income non-taxable, but that he was unaware of the Court's most recent decision on the subject, *James v. United States*, 366 U.S. 213 (1960), in which the Court ruled that funds derived by embezzlement constituted taxable income. Milder never reported

his ill-gotten gains as income, nor did he deduct the repayment as an expense.

Milder raises several contentions on appeal: (1) the charge of failure to report embezzlement receipts for income tax purposes violates a Fifth Amendment guarantee by imposing criminal liability upon an individual for failing to perform an act which would have been self-incriminatory; (2) the statute is vague and thus unconstitutional; (3) failure to report income is not a crime if the income is surrendered, because no fraud upon the government results; (4) the district court erred in refusing to give requested jury instructions which would have explained the effect of appellant's purported lack of familiarity with the *James* decision upon the question of his criminal intent; and (5) certain evidence offered by the government should not have been admitted by the district court.

The government opposes each of appellant's contentions and urges, additionally, that the Fifth Amemdment claim be disposed of on the basis of appellant's alleged failure to assert this defense in a timely manner, as required by Rule 12, F.R. Cr. P., 18 U.S.C. The Fifth Amendment defense here was not asserted until after the jury had rendered its guilty verdict.

We consider first appellant's claims based upon the Fifth Amendment guarantee of freedom from compulsory self-incrimination. The government correctly observes that defenses based upon this guarantee should be raised prior to, or at least during, trial, Rule 12(b), F.R. Cr. P., *supra; Grogan v. United States,* 394 F.2d 287 (5th Cir. 1967); *United States v. Reeves,* 293 F. Supp. 213 (D.D.C. 1968); 1 Wright, *Federal Practice and Procedure* §193, p. 410. We nonetheless consider the Fifth Amendment Defense on its merits.

We reject appellant's argument that the constitutional guarantee of immunity from compulsory self-incrimination bars prosecutions such as the present one. The Fifth Amendment does not release the recipient of illegal income from his duty to file a federal income tax return, *United States v. Sullivan*, 274 U.S. 259 (1927), and it does not authorize him to falsify answers on a return submitted. *United States v. Knox*, 396 U.S. 77 (1969).

The taxpayer in *Sullivan* had derived income through illegal trafficking in liquor, and sought to justify his failure to file a tax return by invoking the self-incrimination clause of the Fifth Amendment. This contention was rejected by Justice Holmes in the following passage:

> If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all . . . It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon.

274 U.S. at 263-264.

The taxpayer in *Knox* did file a return, but falsified statements therein to avoid self-incrimination. The court ruled as follows:

> . . . [O]ne who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself.

396 U.S. at 79. See also, *Bryson v. United States*, 396 U.S. 64, 72 (1969); *Mackey v. United States*, 401 U.S. 667, 705 (1971) (concurring opinion).

The inescapable conclusion to be drawn from these cases is that the Fifth Amendment cannot serve as a bar to the prosecution here on review. Our opinion in *Heligman v. United States*, 407 F.2d 448 (8th Cir. 1969), *cert. denied*, 395 U.S. 977 (1969), supports this conclusion, although *Heligman* and the present case may be distinguishable on their facts.

The opinion of this court in *Nordstrom v. United States*, 360 F.2d 734 (8th Cir. 1966), *cert. denied*, 385 U.S. 826 (1966), answers appellant's next claim that the statute under which he was convicted is unconstitutionally vague in its application to the taxability of embezzlement income. After discussing the decision of the Supreme Court in *James v. United States*, 366 U.S. 213 (1960), Judge Gibson, speaking for the court, wrote the following:

> The opinion of the court in *James* clearly held that embezzlement money was taxable in the year of the embezzlement. . . . By its action here and the accompanying language the court gave notice to all that any future failures to report embezzled funds . . . would subject the embezzler to criminal liability under the federal tax laws.

360 F.2d at 736-737. We reiterate the quoted passage and reject appellant's argument that the statute here involved is too vague to support criminal prosecution.

Appellant next urges that his conviction must be reversed either because restitution of the stolen funds has obviated any income he might have had from the embezzlement, and thus precluded the perpetration of any

tax fraud upon the government, or because the embezzled funds were not used by appellant and thus never were taxable as his income. Neither of these claims withstands analysis. Regarding the effect of restitution, it should be sufficient to cite the Supreme Court ruling, in *Sansone v. United States*, 380 U.S. 343, 354 (1965), that the crime defined by 26 U.S.C. §7201 "was complete as soon as the false and fraudulent understatement of taxes . . . was filed." Appellant's contention that the embezzled money was not income may be disposed of by reference to the following language from the *James* opinion:

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return even though it may still be claimed that he is not entitled to retain the money and even though he may still be adjudged liable to restore its equivalent."

366 U.S. at 219.[3]

We turn next to the claim that the jury should have been instructed with regard to appellant's alleged lack of familiarity with the *James* decision and the effect of this ignorance upon the element of criminal intent. It has been held that willfulness is a state of mind in which the taxpayer is fully aware of the tax obligation which he seeks to conceal; that willfulness requires an

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[3]Appellant recognizes that *James* is devastating to his position, and suggests that the decision should be overruled. This course of action obviously would not be open to us even if we desired to pursue it, and the argument properly should be made to the Supreme Court.

intentional rather than an inadvertent act or omission. See *United States v. Peterson*, 338 F.2d 595, 598 (7th Cir. 1964), *cert denied*, 380 U.S. 911 (1965). Here, the element of willfulness was controverted, and thus it was for the jury to resolve under appropriate instructions whether appellant acted willfully in failing to report the embezzled funds. It is clear that Judge Robinson took pains to instruct the jury on this point. Further, appellant had been permitted to testify in some detail regarding his claimed belief that the money in question was not taxable and the alleged basis for this belief.

Appellant's final allegation of error concerns admission by the district court of various items of evidence. We discern no error in these admissions, and find, further, no prejudicial effect which might warrant reversal even if error had been committed.

The judgment of conviction is affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1659

EDWARD E. MILDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not yet reported. The opinion of the district court is reported at 329 F. Supp. 759.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1972 (Pet. App. 1, 7). On June 9, 1972, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Blackmun to and including June 23, 1972. The petition was filed on June 22, 1972. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of tax evasion for failing to report embezzlement income violates his privilege against self-incrimination.

2. Whether the evidence supports the jury's finding that petitioner willfully attempted to evade taxes which he knew to be due.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of willfully attempting to evade income taxes for 1963, 1964, and 1965, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201.

In 1961, petitioner, an accountant, began a practice of causing the Milder Oil Company, one of his clients, to issue checks for federal excise taxes in excess of the company's actual tax liabilities (Tr. 247). The government's evidence showed that during the period 1960–1966, inclusive, a total of $240,377.90 was withdrawn from the company in the form of excessive

excise tax disbursements, of which $99,066.82 was disbursed by the company in the years 1963, 1964 and 1965 (Tr. 124–125, 326).

Petitioner applied the excess tax monies to federal tax liabilities of other clients, and diverted to himself those clients' tax payment checks by cashing them and keeping the proceeds (Tr. 211–212). The petitioner testified that he sequestered this money out of hatred for his cousins who owned the Milder Oil Company (Tr. 236), and that he did not spend any of it, but put it all in a box in his office (Tr. 215, 247). He also testified that he withdrew all of the approximately $150,000 from this box in 1967 and used it, with other money from various savings accounts, to pay $250,000 to his cousins in satisfaction of their demand for restitution (Tr. 223–226, 248). A defense psychiatrist testified that petitioner took the money out of a neurotic urge arising from hatred of his cousins, and not with the intent of becoming owner of the money (Tr. 284–285). Petitioner testified that while he kept a cumulative tax reporting service in his office, he did not know the funds were taxable income (Tr. 237–238).

The jury was instructed by the district court that petitioner was not on trial for embezzlement (Tr. 364), and that the petitioner's knowledge that the sequestered funds were taxable income, and his specific intent to defraud the government of taxes which he knew to be due, had to be established beyond a reasonable doubt (Tr. 348–358, 363–366). The jury was expressly charged that a civil liability for addi-

tional taxes is an insufficient basis for conviction (Tr. 360); that a taxpayer's good faith belief that he has fully paid his taxes is a defense to criminal prosecution (Tr. 358–359); and that ignorance or misinterpretation of the law would be a valid defense if a specific intent to defraud were thereby negated (Tr. 362–363).

The court of appeals affirmed petitioner's conviction on the grounds that the privilege against self-incrimination, where it has not been claimed on the tax return, is no defense to a prosecution for failing to report income from embezzlement; that restitution of embezzled income in a later year is no defense; and that defenses based on petitioner's lack of intent, and his alleged ignorance and misunderstanding of the taxability of embezzled income, were resolved against petitioner on sufficient evidence and adequate instructions.

ARGUMENT

Petitioner's contentions are without merit and there is no conflict of authority.

1. Petitioner contends (Pet. 6–9) that he cannot be punished for having falsely understated the amount of his gross income in his tax returns because he would have incriminated himself if he had reported his embezzled gains. However, the proper method of invoking the privilege against self-incrimination in such circumstances does not consist of concealing the illegal income and evading the tax but rather of reporting the amounts involved and refusing disclosure of the source. *United States* v. *Sullivan*, 274 U.S. 259.

As Mr. Justice Holmes stated for this Court in *Sullivan* (*id.* at 263–264):

> If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. * * *

Petitioner's Fifth Amendment privilege does not entitle him to file a return falsifying the amount of income. See *United States* v. *Knox*, 396 U.S. 77.

Petitioner's reliance upon *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, involving compulsory filing of forms requiring registration as a lawbreaker for the purpose of being identified as such to law enforcement officials, is not warranted. As Mr. Justice Brennan noted in his concurrence, 390 U.S. at 72–76, those decisions did not impair the holding of *Sullivan*; the questions on the forms in *Marchetti* and *Grosso* (and in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70) were directed at a highly selective group inherently suspect of criminal activities, whereas the questions on the income tax form here and in *Sullivan* are neutral on their face and directed at the public at large. See also *California* v. *Byers*, 402 U.S. 424, 428–430, 433–434.

2. There is no merit in petitioner's contention (Pet. 10–16) that the evidence does not support the finding by the jury that he willfully attempted to evade additional taxes which he knew to be due.

In *James* v. *United States*, 366 U.S. 213, this Court, overruling *Commissioner* v. *Wilcox*, 327 U.S. 404, held that the proceeds of embezzlement are taxable income despite the embezzler's theoretical obligation to make repayment. The jury here was instructed to consider petitioner's asserted reliance on *Wilcox* and to acquit him if a reasonable doubt existed that petitioner believed the money was his income and that it was subject to taxation. Petitioner apparently concedes that these instructions on the issue of willfulness were "adequate" (Pet. 16). The jury evidently resolved the issue of petitioner's state of mind against him.[1]

Petitioner's argument (Pet. 12), that loss carryovers from the year he repaid the embezzled funds would have the effect of reducing his taxable income in the prosecution years below the amounts then reported, is irrelevant; the crime "was complete as soon as the false and

[1] Since the jury was told to consider whether petitioner did in fact misunderstand his tax obligations, it was permissible for the trial court to decline to give petitioner's proposed instruction (Pet. 13) analyzing this Court's decisional processes on the liability issue.

fraudulent understatement of taxes * * * was filed. *Sansone* v *United States,* 380 U.S. 343, 354. Also see *Willingham* v. *United States,* 289 F. 2d 283 (C.A. 5).

Petitioner also argues (Pet. 14) that his dominion and control over the funds was insufficient as a matter of law to render them gross income to him. However, the extent of control here was no less than in *James* v. *United States, supra.* In addition, unlike the facts in *Edwards* v. *United States,* 375 F. 2d 862 (C.A. 9), upon which petitioner relies, there was no indication in this case that petitioner was engaged in "merely a postponement of disclosure or payment" (375 F. 2d at 867). The many years over which petitioner abstracted the excise tax funds, and the discrepancy between the amount of company funds abstracted ($240,377.90) and the amount in petitioner's money box (about $150,000), contradict petitioner's argument and justify the jury's disbelief in his protestations that the scheme was only a temporary act of spite.[2]

[2] In any event, insofar as *Edwards* may hold that an intention to report income at a later time is a defense to a prosecution for tax evasion, it would appear to be in conflict with *Sansone* v. *United States, supra.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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